

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2012-000366-001 DT

12/11/2012

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT

J. Eaton

Deputy

SCHARBCO INVESTMENTS LLC  
HUBERT TUTWILER  
DALE SCHRADER

SCHARBCO INVESTMENTS LLC  
6816 N 29TH LN  
PHOENIX AZ 85017  
HUBERT TUTWILER  
6816 N 29TH LN  
PHOENIX AZ 85017  
DALE SCHRADER  
6816 N 29TH LN  
PHOENIX AZ 85017

v.

JAMES GOODARD (001)  
DANIELLE NIEVES (001)

JAMES GOODARD  
PO BOX 1135  
PHOENIX AZ 85001  
DANIELLE NIEVES  
PO BOX 1135  
PHOENIX AZ 85001

MARYVALE JUSTICE COURT  
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

**Lower Court Case No. CC2011-21972.**

Defendants Appellants Danielle Nieves and James Goodard (Defendants) appeal the Maryvale Justice Court's determination dismissing their counterclaim with prejudice after the trial court dismissed Plaintiffs' complaint. Defendants contend the trial court erred. For the reasons stated below, the court affirms in part and reverses in part the trial court's judgment.

**I. FACTUAL BACKGROUND.**

On November 3, 2011, Plaintiffs filed a 5-Day Notice alleging Defendants failed to pay November rent and failed to allow the landlord to make repairs at the premises. The 5-Day

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2012-000366-001 DT

12/11/2012

Notice alleged the tenants were unresponsive to the landlord's attempts to communicate and to gain entry into the home. Thereafter, on November 9, 2011, Plaintiff filed a Complaint in an eviction action alleging Defendants' failure to pay rent and requesting monthly rent of \$950.00; late fees of \$600.00; rental concessions for a pet deposit and taxes of \$22.65; a past due water bill of \$159.52; a prior eviction in the amount of \$90.00; and other damages of \$120.00 for a total request of \$2,146.17.

On November 16, 2011, Defendant filed a counterclaim alleging (1) they rented the apartment from April 15, 2011 and their planned move out would be November 26, 2011; (2) there were health and safety conditions at the premises which they requested that the landlord repair; and (3) detailing the health and safety conditions as:

1. Broken glass, exposed electrical outlets and fixtures, no lock on rear sliding door, and broken window with no lock. April 3<sup>rd</sup> thru present. [Sic.]
  2. No heat or A/C in addition of house. 130° in summer. June 1, 2011. [Sic.]
- Leaking roof and mouse rodent problem. Sept. 17, 2011. Oct. 11, 2011. Oct. 26, 2011. [Sic.]

Defendants alleged the landlord failed to maintain the premises in a habitable condition and requested damages of \$16,345.00. Their claim included a claim for (1) emotional distress; (2) destroyed property; and (3) reduced value of the dwelling. They also requested moving expenses of almost \$3,000.00. Defendants filed an Answer to Plaintiff's complaint along with a Motion To Dismiss claiming they were not properly served and there was no 5-day notice. Defendants further alleged they had delivered a 5-day Health and Safety Notice to Plaintiff claiming the roof leaked and the premises were infested with mice.

The trial court held a hearing on November 16, 2011.<sup>1</sup> At the hearing Defendants agreed they had not paid rent but alleged they terminated the lease.<sup>2</sup> The trial court asked Defendants if they were still at the premises and, upon Defendants stating they were still "there", the trial court ruled it was not a termination if the Defendants were still there and had not returned the keys.<sup>3</sup> Defendants alleged "the exact wording" of the statute allowed them to vacate within "a reasonable time" if they sent a 5-Day Notice pursuant to A.R.S. § 33-1361.<sup>4</sup> Defendants also claimed they were never served with either a 5-Day Notice<sup>5</sup> or the Complaint and Summons.<sup>6</sup> Plaintiff's representative stated he (1) served Defendants with the 5-Day Notice "myself"; (2) had a certificate of non-service from a process server for the Summons and Complaint; and (3)

---

<sup>1</sup> Audio transcript, hearing, November 16, 2011 at 3:28:05.

<sup>2</sup> *Id.* at 3:28:36-39.

<sup>3</sup> *Id.* at 3:28:40-56.

<sup>4</sup> *Id.* at 3:29:03-23.

<sup>5</sup> *Id.* at 3:29:28-35.

<sup>6</sup> *Id.* at 3:29:35-38.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2012-000366-001 DT

12/11/2012

went himself and gave them the papers.<sup>7</sup> The trial court ruled Plaintiff would need to bring in the process server to show Defendants were served according to the statute.<sup>8</sup> The trial court set the matter for November 18, 2011.

On November 18, 2011, the trial court dismissed Plaintiff's action because (1) Plaintiff is an LLC. and (2) there was no partner or officer present. The court dismissed Plaintiff's action without prejudice. The trial court also dismissed Defendants' counterclaim with prejudice. The ruling stated:

Defendant [sic.] filed counterclaim which is not permissible [sic.] in a forcible dismissed with prejudice.

No CD recording or transcript was provided for this hearing. Defendants filed a Motion to Reconsider on November 23, 2011. The trial court docket does not reflect that the trial court ruled on this motion.

Defendants filed a timely appeal from the dismissal of their counterclaim and alleged the trial court erred by not transferring their action to the Superior Court for determination. Plaintiffs failed to file a responsive memorandum. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12-124(A).

II. ISSUE: DID THE TRIAL COURT ERR BY DISMISSING DEFENDANTS' COUNTERCLAIM TO THE FORCIBLE DETAINER ACTION WITH PREJUDICE.

Defendants allege the trial court erred in dismissing—with prejudice—their counterclaim to the forcible detainer action. In evaluating Defendants' assertion, this Court first recognizes the long history of treating forcible detainer and eviction actions as limited proceedings. In *Olds Bros. Lumber Co. v. Rushing*, 64 Ariz. 199, 167 P.2d 394 (1946), the Arizona Supreme Court held:

Such, however, is not the case in a forcible entry and detainer action, for the object of such an action is to afford a summary, speedy and adequate remedy for obtaining possession of the premises withheld by a tenant in violation of the covenants of his tenancy or lease, or otherwise withheld within the meaning of the statute defining forcible entry and detainer.

The Arizona Supreme Court continued and held:

It is plain from this language that the right of actual possession is the only issue that can be raised in a forcible entry or detainer action and this court has had no difficulty in interpreting this language on not less than three occasions in the following cases: *Bishop v. Perrin*, 4 Ariz. 190, 35 P. 1059; *Sullivan v. Woods*, 5

---

<sup>7</sup> *Id.* at 3:30:21-48.

<sup>8</sup> *Id.* at 3:30:56-3:31:22.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2012-000366-001 DT

12/11/2012

Ariz. 196, 50 P. 113; *Felber v. Thorpe*, 19 Ariz. 594, 173 P. 1058. As we have said, the object of a forcible entry and detainer action is to afford a summary, speedy and adequate remedy for obtaining possession of premises withheld by tenants, and for this reason this objective would be entirely frustrated if the defendant were permitted to deny his landlord's title, or to interpose customary and usual defenses permissible in the ordinary action at law. For this reason counterclaims, offsets and cross complaints are not available either as a defense or for affirmative relief in such action, as indicated by our statutes and the statutes of most states.

*Olds Bros. Lumber Co. v. Rushing*, *id.*, 64 Ariz. at 204–05, 167 P.2d at 397.

In *United Effort Plan Trust v. Holm*, 209 Ariz. 347, 350-51, ¶ 21, 101 P.3d 641, 644-45, ¶ 21 (Ct. App. 2004) the Arizona Court of Appeals reviewed the history of forcible detainer/eviction actions and stated:

The purpose of a forcible-detainer action is limited, however; it is not a vehicle to decide whether the parties have a landlord-tenant relationship or were under a lease agreement. *See RREEF Mgmt. Co. v. Camex Prods., Inc.*, 190 Ariz. 75, 79, 945 P.2d 386, 390 (App.1997) (A forcible-detainer suit cannot “be used to determine the existence of a rental agreement between the parties.”); *Colonial Tri-City Ltd. P'ship v. Ben Franklin Stores, Inc.*, 179 Ariz. 428, 434, 880 P.2d 648, 654 (App.1993) (“ [W]hether the parties have created a landlord and tenant relationship is ... not properly determined in a summary proceeding.”). Rather, the action is intended to “afford a summary, speedy and adequate remedy for obtaining possession of the premises withheld by a tenant in violation of the covenants of his tenancy or lease.” *Phoenix–Sunflower*, 105 Ariz. at 336, 464 P.2d at 619. *See Olds Bros. Lumber Co. v. Rushing*, 64 Ariz. 199, 204–05, 167 P.2d 394, 397 (1946). As such, no counterclaims, offsets or cross complaints are “available either as a defense or for affirmative relief in such action.” *Olds Bros. Lumber*, 64 Ariz. at 205, 167 P.2d at 400.<sup>3</sup> Although the fact of title may be admitted if incidental to proving a right to possession, the merits of title cannot be litigated. A.R.S. § 12–1177 (2003); *Phoenix–Sunflower Indus.*, 105 Ariz. at 337, 464 P.2d at 620; *Andreola*, 26 Ariz.App. at 557, 550 P.2d at 111. The only issue to be decided in the action is the right of actual possession. Thus the only appropriate judgment is the dismissal of the complaint or the grant of possession to the plaintiff. *Olds Bros. Lumber*, 64 Ariz. at 205, 167 P.2d at 400. A real dispute regarding a landlord-tenant relationship must be tried in an “ordinary civil action, in which time periods are not accelerated, counter- and cross claims are allowed, and there is an opportunity for discovery.” *RREEF Mgmt. Co.*, 190 Ariz. at 79, 945 P.2d at 390.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2012-000366-001 DT

12/11/2012

Indeed, this holding is a continuation of the rationale for the decision in *RREEF Mgmt. Co. v. Camex Prods., Inc.*, 190 Ariz. 75, 79, 945 P.2d 386, 390 (Ct. App. 1997) where the Court of Appeals held that if there was a real dispute about a landlord-tenant relationship, it must be tried in “an ordinary civil action, in which time periods are not accelerated, counter- and cross claims are allowed and there is an opportunity for discovery”. Therefore, the trial court did not err in dismissing the counterclaim as a forcible detainer action is not the proper arena for trying a dispute about the condition of the rental property.

This, however, does not mean the trial court should have dismissed Defendants’ counterclaim with prejudice. Indeed, the case law requiring a dismissal of the claim imputes a determination that the action will be dismissed without prejudice. In *Olds Brothers Lumber Co. v. Rushing, id.*, 64 Ariz. at 205, 167 P.2d at 398 the Arizona Supreme Court held a forcible detainer action is no bar to subsequent proceedings. This implies any dismissal will be a dismissal without prejudice to refile. Additionally, Rule 8 of the Rules of Procedure for Eviction Actions (RPEA) governs counterclaims and states that dismissals should be dismissals without prejudice. The rule states:

**a. Basis.** Unless specifically provided for by statute, no counterclaims, cross claims, or third party claims may be filed in eviction actions. Any counterclaim filed without a statutory basis shall be stricken and dismissed without prejudice. All counterclaims must be filed in writing and served upon the opposing party. A counterclaim shall:

(1) State specific facts claiming that the landlord has violated the rental agreement or an applicable statute so that the landlord has an opportunity to prepare a defense; and

(2) If any notices were required, state the approximate date and manner those notices were sent to the plaintiff and summarize the content of those notices.

**b. Impact on Justice Court Jurisdiction.** The filing of a counterclaim shall not defeat jurisdiction of a justice court in an eviction action, and no eviction action shall be transferred to the superior court solely because a counterclaim was filed unless it is permitted by statute and is not within the statutory jurisdiction of the justice court. The justice court shall review such claims to determine whether they have a statutory basis and whether the prayer for relief is within or exceeds the jurisdiction of the justice court. If a counterclaim has a statutory basis and the prayer for relief is not within the jurisdiction of the justice court, the court shall transfer the matter to the superior court. Where the counterclaim filed includes one or more aspects that are defective or impermissible, the court may permit the defendant to restate it in a proper fashion, or order the counterclaim dismissed without prejudice.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2012-000366-001 DT

12/11/2012

**c. Consolidation.** An eviction action may be consolidated only with one or more eviction actions but shall not be consolidated with any other type of action.

**d.** If a residential landlord is not in compliance with the rental agreement or statute, the tenant may counterclaim for any amount the tenant is entitled to recover under the rental agreement or statute.

Both sections (a) and (b) provide for dismissals to be dismissals without prejudice. Nonetheless, the trial court dismissed Defendants' claim with prejudice, thereby precluding Defendants from continuing with their claims in an arena that guarantees the full panoply of the protection of the civil rules. Dismissing Defendants' claims with prejudice was error on the trial court's part as the RPEA mandates any dismissal must be without prejudice.

III. CONCLUSION.

Based on the foregoing, this Court concludes the Maryvale Justice Court erred when it dismissed Defendants' claims with prejudice but did not err by dismissing Defendants' claims from a forcible detainer action.

**IT IS THEREFORE ORDERED** affirming in part and reversing in part the judgment of the Maryvale Justice Court.

**IT IS FURTHER ORDERED** remanding this matter to the Maryvale Justice Court for all further appropriate proceedings.

**IT IS FURTHER ORDERED** signing this minute entry as a formal Order of the Court.

/s/ Myra Harris  
THE HON. MYRA HARRIS  
Judicial Officer of the Superior Court

121220120730